Supreme Court, U.S.
FILED
JUL 17 2000
CLERK

(2)

No. 99-1823

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Stephen F. Fisher, Esq.
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
Counsel for Respondent
2100 Landmark Building
301 North Main Street
Greenville, SC 29601-2122
(864) 232-7000

Wright Appellate Services 0702
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

34 pp

CORPORATE DISCLOSURE STATEMENT OF WAFFLE HOUSE, INCORPORATED

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Waffle House, Incorporated, through its attorneys, respectfully submits this Corporate Disclosure Statement.

Waffle House, Inc. has no parent company. Waffle House has several subsidiary companies. However, none of these subsidiaries are publicly traded.

QUESTION PRESENTED

Does an employee's agreement to arbitrate employment-related disputes with an employer preclude the Equal Employment Opportunity Commission from seeking victim-specific remedies for discrimination against the employer, such as backpay, reinstatement and damages, in an enforcement action filed in Federal Court against the employer?

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT OF WAFFLE HOUSE, INCORPORATED i
QUESTIONS PRESENTED ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
RESPONDENT'S BRIEF IN OPPOSITION 1
STATEMENT 1
1. Factual Background 1
2. History of the Case 6
ARGUMENT 9
A. Certiorari Is Inappropriate Because Only Three Circuit Courts Of Appeals Have Addressed The Issue Presented By This Petition 9
B. This Case Does Not Present A Conflict Meriting This Court's Review Because It Presents Only An Infrequently Recurring Issue 14
C. This Case Does Not Present An Important Federal Question Because There Is No Evidence That The Statutory Aims Of The ADA And Other Federal

Employment Discrimination Statutes Are Not Being Adequately Addressed In The Arbitration Forum..... 15

D. The Fourth Circuit's Decision Is Faithful To This Court's Precedents..... 17

E. The Fourth Circuit's Decision Is Consistent With Decisions Of Other Courts Of Appeals In Which The Scope Of An EEOC Lawsuit Has Been Limited By Private Individuals..... 23

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

CASES:

EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999)..... 10,11

EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987)..... 25

EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993)..... 23

EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2nd Cir.1998)..... 10,11

EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975)..... 26

EEOC v. United States Steel Corp., 921 F.2d 489 (3rd Cir. 1990)..... 23

EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999) (Petitioner's App. A)..... 10

General Telephone Co. v. EEOC, 446 U.S. 318 (1980) 17,18,19,20,22,23

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) 22

Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).. 11,21

New Orleans Steam Ship Assoc. v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982)..... 26

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F.Supp. 190, 199 n.12 (D.Mass.1998), aff'd 170 f.3d 1 (1st Cir. 1999) 15

CONSTITUTION, STATUTES, and REGULATIONS:

Federal:

9 U.S.C. § 1 6

42 U.S.C. § 2000e-5(f)(1)..... 22

RESPONDENT'S BRIEF IN OPPOSITION

For the following reasons, Respondent respectfully suggests that the Petition for a Writ of Certiorari should be denied.

STATEMENT

This case involves the efforts of the Equal Employment Opportunity Commission ("EEOC" or "Petitioner") to seek make-whole relief under the Americans with Disabilities Act ("ADA") on behalf of Eric Scott Baker ("Baker") based on discrimination allegedly committed by Waffle House, Inc. ("Waffle House" or "Respondent"). The United States Court of Appeals for the Fourth Circuit held that the arbitration agreement signed by Baker when he applied for employment with Waffle House barred recovery by the EEOC of such individualized monetary or equitable relief.

1. Factual Background.

Baker, the sole individual on whose behalf the EEOC filed this action, began working for Waffle House on or about August 10, 1994. On June 23, 1994, Baker completed and signed a Waffle House employment application that contained the following arbitration provision:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc. or any subsidiary of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

(C.A. App. at 26).

Baker did not specify on his employment application that he was applying for any specific position or employment at any specific restaurant. Baker did not respond to the application's question asking "Position(s) applied for?" (C.A. App. at 26).

The hiring process that led to Baker's employment was a continuous chain of interrelated events during which Baker was specifically referred from one manager to the next, commencing with Waffle House's District Manager, Lee Motlow, and ending with Restaurant Manager, Mike Bradley. According to the EEOC's description of the series of events that led to Baker's employment,[1] Baker:

(1) first met with Waffle House's District Manager Lee Motlow;

(2) Motlow referred Baker to a specific Waffle House restaurant;

(3) Baker met with the manager of the Waffle House restaurant to which he had been referred by District Manager Motlow;

(4) the restaurant manager at the restaurant to which Baker had been referred by Motlow hired Baker to work at another nearby

---

[1]This description is taken from the detailed factual recitation offered by the EEOC in its standard interrogatory responses made pursuant to D.S.C. Local Rule 26.03. The Local Rules of the United States District Court for the District of South Carolina provide that these mandatory interrogatory responses "may be relied upon and used in the same manner as discovery responses obtained under the Federal Rules of Civil Procedure." D.S.C. Local Rule 26.02.

Waffle House, unit number 446, in West Columbia;

(5) Baker then went to the West Columbia restaurant, met with the Restaurant Manager named Mike Bradley, agreed on a starting date and thereafter commenced working on August 10, 1994.

(C.A. App. at 13).[2]

[2]After it had filed its standard interrogatory responses, and in response to Waffle House's petition to compel arbitration, the EEOC submitted Baker's affidavit which also described the events leading to Baker's employment by Waffle House. A comparison of Baker's affidavit with the EEOC's interrogatory response reveals that Baker's affidavit simply omits relevant facts about Baker's initial meeting with Motlow and Motlow's subsequent reference of Baker to Bradley. The relevant portion of Baker's affidavit read:

> 2. On June 23, 1994, I went to the Waffle House facility at I-26 and S.C. 302, in Columbia, South Carolina, and completed a Waffle House Application for Employment. I was twenty years old at that time.
> 3. I completed the Waffle House Application for Employment while I was sitting in a booth at the restaurant.
> 4. A manager was sitting with me while I completed the application form.
> . . .
> 10. The manager hired me; however, I subsequently declined the job offer.
> 11. A few weeks after the job offer, I spoke with Mike Bradley, manager of another nearby Waffle House, Unit #446 in West Columbia, South Carolina, and Bradley offered me a job at Unit #446, which I accepted.
> 12. I did not have to reapply or take another math test when I was offered the job at Unit #446.

(C.A. App. at 28-29). The only meaningful difference between the EEOC's interrogatory response and Baker's affidavit, was the omission of the name of the first Waffle House manager with whom Baker met, who was District Manager Motlow, and the fact that Motlow referred Baker to Mike Bradley, who was the manager of the restaurant at which Baker was eventually employed.

Waffle House discharged Baker on or about September 5, 1994, after he had a seizure at work on August 26, 1994. Subsequent to his discharge, Baker filed a charge of discrimination with the EEOC in which he alleged that his discharge constituted a violation of the ADA.

Baker's charge was initially deferred to the South Carolina Human Affairs Commission ("SCHAC") for investigation. SCHAC ultimately concluded that there did not appear to be reasonable cause to find that Baker's discharge was discriminatory. The matter was then referred to the EEOC for review.

The EEOC conducted its own investigation of Baker's claim and eventually issued its conclusion that there did appear to be reasonable cause to believe that Baker's discharge violated the ADA. After issuing a Notice of Conciliation Failure and despite Baker's contractual commitment to arbitrate any dispute arising from his employment with Waffle House, the EEOC filed this action on Baker's behalf.

2. History of The Case.

The EEOC filed this action to obtain relief on behalf of Baker on September 9, 1996, and to seek an injunction based on the alleged discrimination toward Baker. The EEOC's Complaint alleged that Waffle House violated the ADA when it discharged Baker several weeks after he was hired. The EEOC sought relief solely on behalf of Baker. The EEOC did not allege there were any similarly situated individuals and did not challenge any policy or continuing employment practice of Waffle House.

On December 2, 1996, Waffle House filed a petition to compel arbitration and to stay the proceedings based on the requirements of the Federal Arbitration Act, 9 U.S.C. § 1, et seq., ("FAA"), and a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), since all claims asserted in the litigation were subject to the arbitration agreement that Baker executed as part of his application for employment with Waffle House. On May 9, 1997, after the parties had filed their respective response

and reply briefs and Waffle House had filed a supplemental brief, the Magistrate Judge to whom the matter had been referred issued a Report and Recommendation in which the Magistrate Judge recommended that Waffle House's petition to compel arbitration be granted and the EEOC's action be stayed pending arbitration. (Petitioner's App. D at 53a).

Following further briefing and oral argument on the EEOC's objections to the Magistrate Judge's Report and Recommendation, the District Court entered an Order on March 24, 1998, in which it rejected the Report and Recommendation of the Magistrate Judge. The District Court reasoned that because Baker submitted his employment application at one Waffle House location and was later employed at a different location without submitting another written application form, Baker's acceptance of employment was not made pursuant to the written application that included the agreement to arbitrate. (Petitioner's App. A at 5a-6a; App. B at 33a-34a). Accordingly, the District Court concluded that no arbitration contract existed between Waffle House and Baker, and refused to compel arbitration or grant a stay in this matter. (Petitioner's App. B at 34a).

Waffle House filed its notice of appeal to the Fourth Circuit Court of Appeals relating to the District Court's decision on March 31, 1998. After hearing oral argument on March 1, 1999, the Fourth Circuit decided on October 6, 1999, that Baker's execution of a general Waffle House,

Inc. employment application containing an arbitration clause, followed Baker to whichever Waffle House location hired him. (Petitioner's App. A at 6a-7a). Therefore, the Fourth Circuit concluded that Baker contractually agreed to arbitrate any employment related claim against Waffle House. (Id. at 7a).

Addressing the effect of Baker's agreement to arbitrate on the EEOC's enforcement rights, the Fourth Circuit concluded that the EEOC could not be compelled to arbitrate its claims against Waffle House by virtue of the arbitration agreement between Baker and Waffle House. (Petitioner's App. A at 2a, 7a-13a, 17a-18a). The Fourth Circuit also concluded, however, that because Baker was subject to an arbitration agreement, the EEOC was precluded from seeking "make-whole" relief, such as backpay, reinstatement, and compensatory and punitive damages, on behalf of Baker in a judicial forum. (Id. at 2a, 14a-18a).

On November 18, 1999, the EEOC petitioned the Fourth Circuit for Rehearing and for Rehearing En Banc. This Petition was denied by the Fourth Circuit on January 14, 2000, and the Fourth Circuit's mandate was issued on January 24, 2000.

The EEOC filed this Petition for a Writ of Certiorari on May 15, 2000. In its Petition, the EEOC asks this Court to review the Fourth Circuit's decision only insofar as it

relates to the limitation on the EEOC's ability to seek "make-whole" relief in a judicial forum on behalf of Baker.

ARGUMENT

Certiorari should be denied. Only three circuit courts of appeals have decided the issue presented by this Petition; nine circuit courts of appeals have yet to be heard on this issue. Moreover, the EEOC's petition does not present an important federal question. Instead, it presents the infrequently recurring issue of the effect of a private arbitration agreement on the remedies the EEOC may seek in an enforcement action filed in federal court. There is no evidence that the statutory aims of Title VII, the ADA and other federal employment discrimination statutes are not being adequately addressed in the arbitration forum. The Fourth Circuit's decision is consistent with the Court's precedents and strikes an appropriate balance between the competing interests of the EEOC's enforcement rights and the federal policy favoring arbitration.

1. Certiorari Is Inappropriate Because Only Three Circuit Courts Of Appeals Have Addressed The Issue Presented By This Petition.

Rule 10(a) of the Rules of the Supreme Court of the United States provides that one of the reasons the Court considers in deciding whether to grant a petition for a writ

of certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .." In this case, there is a split among the courts of appeals that have decided the effect of a charging party's binding agreement to arbitrate employment-related disputes on the EEOC's ability to seek "make-whole" relief in a judicial forum on behalf of the charging party. Nonetheless, it is premature for the Court to review this issue.

To date, only three (3) circuit courts of appeals have decided this issue: the Second Circuit in EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998); the Fourth Circuit in this case, EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999) (Petitioner's App. A); and the Sixth Circuit in EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).

In Kidder, Peabody, a case arising under the Age Discrimination in Employment Act ("ADEA"), the Second Circuit held in a well-reasoned decision that "where the individual has freely agreed to arbitrate the ADEA claim, that decision, like the decision to waive or settle a claim, prevents the EEOC from pursuing monetary remedies on behalf of the individual in the federal forum." 156 F.3d at 302. The Second Circuit analyzed the numerous circuit court decisions which "have uniformly held that the EEOC may not seek monetary relief in the name of an employee who has waived, settled, or previously litigated the claim"

but which have at the same time "allowed the EEOC to pursue injunctive relief [on the same claim]. . . because by seeking injunctive relief, the EEOC promotes public policy and seeks to vindicate rights belonging to the United States as sovereign." Id. at 301, 302 (citations omitted). The Second Circuit reasoned that its decision was consistent with these decisions and with the need to balance the EEOC's interest in pursuing actions "to eradicate and prevent employment discrimination" with the "liberal federal policy favoring arbitration agreements" expressed in this Court's decision in Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). Id. at 302, 303. The Second Circuit also reasoned that the threat of a monetary award obtained by an individual through arbitration would have no less a deterrent effect on an employer than the threat of a monetary award obtained by the EEOC through litigation in federal court, whereas "the public interest in a back pay award [in this context] is minimal." Id. at 302, 303 (citations omitted).

After the Second Circuit decided Kidder, Peabody, the Sixth Circuit considered the same issue in Frank's Nursery, a Title VII race discrimination case, and reached a different result. After discussing at length the enforcement mechanisms provided under Title VII and the legislative

history behind the 1972 amendments to the enforcement mechanisms,[3] the Sixth Circuit determined that an arbitration agreement entered into by an employee with his employer had absolutely no effect on the EEOC's enforcement rights, including the ability to seek monetary relief on behalf of an employee who had entered into an arbitration agreement. 177 F.3d at 468. Of particular importance to the Sixth Circuit was the fact that an individual does not possess any right to sue that may be subject to an arbitration agreement, until the EEOC has relinquished its exclusive jurisdiction over the charge of discrimination. Id. at 455-56, 462. In addition, the Sixth Circuit rejected the parallel drawn by the Second Circuit to circumstances where an employee has waived, settled, or previously litigated his claim. The Sixth Circuit determined that because an employee who has merely entered into an arbitration agreement has never actually adjudicated his claim in any forum, or received any relief from the employer in settlement of his claim, there is no support to be drawn from these latter situations for limiting the EEOC's ability to pursue monetary damages on behalf of an employee who has entered into an arbitration agreement. Id. at 462-467.

---

[3] In 1972, Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, as an amendment to Title VII. Pursuant to this amendment, the EEOC obtained the power to bring suit in federal court to enforce Title VII against private employers.

In considering the effect in this case of Baker's arbitration agreement on the EEOC's ability to pursue make-whole relief on behalf of Baker, the Fourth Circuit had the benefit of both the Second and Sixth Circuit's decisions. The Fourth Circuit agreed "with the balance struck by the Second Circuit" and held that the EEOC may not seek individual-specific relief in federal court on behalf of an individual who has entered into an agreement to arbitrate with his employer. (Petitioner's App. A at 15a).

Because the "split" among the courts of appeals is only 2-1, the issue presented by the EEOC's Petition has not yet sufficiently ripened to justify review by this Court. The remaining nine (9) courts of appeals have not yet had the opportunity to address this issue. It remains to be seen whether the courts of appeals will truly be divided on this issue, or whether the decision reached by the Sixth Circuit will be an aberration. Given that the majority of the decisions, from the Second and Fourth Circuits, have gone the same way on this issue, the trend appears to be in favor of limiting the EEOC's ability to seek make-whole relief in a judicial forum on behalf of an individual who has entered into an agreement to arbitrate his employment-related claims with his employer. Accordingly, this Court should defer reviewing this issue until such time as more of the courts of appeals have had an opportunity to consider and decide this issue and until it becomes clear, if ever, that the courts of appeals are truly divided on the resolution of this issue.

2. This Case Does Not Present A Conflict Meriting This Court's Review Because It Presents Only An Infrequently Recurring Issue.

Despite the EEOC's contention that the "question presented in this case can be expected to recur frequently in the near future," (Petition at 18), the fact remains that situations in which an employee's arbitration agreement with his employer may affect the EEOC's enforcement rights, represent only a minute fraction of discrimination charges that are filed.

According to the EEOC's statistics, there were 77,444 charges of discrimination filed in 1999. *See* http://www.eeoc.gov/stats/charge.html (July 5, 2000). Of these cases, the EEOC filed suit (either directly or through intervention) in only 439. See http://www.eeoc.gov/stats/litigation.html (July 5, 2000); see also Petition at 18. Thus, only .57% of all charges filed resulted in litigation by the EEOC. Of this .57%, there is no evidence that there is any meaningfully substantial number of cases in which the EEOC's ability to seek make-whole relief on behalf of the individual employee was affected by an agreement to arbitrate entered into by the employee with his employer.

In an effort to create the appearance that this issue is of greater importance than it is, the EEOC states that there is an "increasingly large number of instances in which pre-dispute arbitration agreements are a condition of employment." (Petition at 18). However, the authority cited by the EEOC notes only that as of 1997, 8.4% of employers were considering implementing mandatory arbitration programs as compared to 1.3% of employers that actually had such programs in place. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F.Supp. 190, 199 n.12 (D. Mass. 1998), aff'd, 170 F.3d 1 (1st Cir. 1999). The EEOC failed to present any evidence or authority addressing the only issues relevant to this Petition, which are (1) how frequently the EEOC's ability to seek make-whole relief on behalf of an employee may be affected by the employee's agreement to arbitrate with his employer; and (2) whether any alleged effect results in any meaningful limitation on the EEOC's ability to protect the public interests reflected in the federal anti-discrimination statutes.

The circumstances presented by this Petition will arise in only a small fraction of all actions filed by the EEOC, and an even smaller fraction of all charges that result in action by the EEOC. Therefore, the issue presented by this Petition is, at best, an infrequently arising anomaly unworthy of this Court's review.

3. This Case Does Not Present An Important Federal

Question Because There Is No Evidence That The Statutory Aims Of The ADA And Other Federal Employment Discrimination Statutes Are Not Being Adequately Addressed In The Arbitration Forum.

The EEOC's strong objection to requiring employees who have entered into arbitration agreements to arbitrate their individual claims for relief implies that the EEOC will be able to obtain more relief for the employee than the employee could obtain through arbitration. However, there is no evidence to suggest that individuals receive less relief by arbitrating their employment discrimination claims as opposed to litigating them. In the absence of such evidence, this Court cannot simply presume that the purposes of Title VII, the ADA and other federal employment discrimination statutes are not being met by requiring individuals to arbitrate their individual claims for relief in circumstances such as those presented by this Petition. Thus, until there has been sufficient experience with arbitration awards on individual claims resulting from enforcement actions filed by the EEOC, this Court is not in a position to assess whether the statutory aims of Title VII, the ADA and other federal employment discrimination statutes are being adequately addressed in the arbitration forum.

4. The Fourth Circuit's Decision Is Faithful To This Court's Precedents.

a. The Fourth Circuit's decision gives deference to the EEOC's responsibility to act in the public interest to enforce federal anti-discrimination laws.

The Fourth Circuit's decision is consistent with this Court's decision in General Telephone Co. v. EEOC, 446 U.S. 318 (1980). In General Telephone, this Court considered and decided only the narrow issue of whether the EEOC must satisfy the requirements of Federal Rule of Civil Procedure 23 when it sues on behalf of a group of employees. This Court answered this question, and only this question, in the negative. Neither arbitration generally nor the strong policy favoring arbitration expressed in the FAA were at issue in General Telephone.

The essence of the holding in General Telephone was that the EEOC need not satisfy the requirements of Rule 23 because it does not merely sue as a surrogate for the individuals on whose behalf it seeks relief. As this Court described in its discussion of the purpose of an EEOC enforcement action, the EEOC acts primarily in the public interest to enforce the federal anti-discrimination laws:

> The EEOC's civil suit was intended to supplement, not replace, the private action. [citation omitted] The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded. . . . These private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC enforcement rights should not be considered representative actions subject to Rule 23. Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.' 118 Cong. Rec. 4941 (1972). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

General Telephone, 446 U.S. at 326.

The Fourth Circuit's decision does no violence to this holding. Though the Fourth Circuit's holding bars the EEOC from seeking monetary relief on behalf of an individual who has signed an arbitration agreement, the

EEOC remains empowered to seek a federal judicial declaration that a given employer's employment practices violate the law and an injunction to prevent future violations. Forcing employers to abide by the anti-discrimination laws is the issue that has public interest implications. The Fourth Circuit's decision fully protects the EEOC's ability to protect this public interest. On the other hand, however, as found by the Fourth Circuit, the public interest in the damages paid to a specific individual because of an unlawful employment decision is negligible.

In its Petition for a Writ of Certiorari, the EEOC asserts that General Telephone stands for the proposition that in an enforcement action, "the EEOC is not a representative of private parties in litigation." (Petition at 14). The EEOC misstates this Court's decision in General Telephone by eliminating the word "merely" from the Court's statement that "the EEOC is not *merely* a proxy for victims of discrimination." Id.

The Court's choice of the word "merely" in its statement describing the EEOC's representative role in enforcement actions is not meaningless as the EEOC suggests. Indeed, the word "merely" means that the EEOC assumes another role *in addition to* being a proxy for victims of discrimination. Thus, contrary to the EEOC's assertion, General Telephone stands for the proposition that the EEOC wears two hats in an enforcement action: (1) as representative of the public interest; and (2) as representative of the individual victims of discrimination.

And, as stated by this Court, it is the former capacity that is the EEOC's "overriding" concern.

Based upon its erroneous interpretation of General Telephone, the EEOC asserts that an individual cannot limit the scope of an EEOC action by entering into a private arbitration agreement. This assertion is not supported by the decision in General Telephone. As discussed above, General Telephone recognizes that in an enforcement action, the EEOC is, in part, "a proxy for victims of discrimination." Id. Therefore, contrary to the EEOC's argument, General Telephone supports the Fourth Circuit's decision that the scope of an EEOC enforcement action may be limited by an arbitration agreement entered into by an individual on whose behalf the EEOC sues.

Likewise, the Fourth Circuit's decision is not inconsistent with this Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). In Gilmer, this Court noted that "an individual . . . claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action" and observed that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." Id. at 28-29. Neither of these assertions are contradicted or undermined by the Fourth Circuit's decision in this matter. Although the Fourth Circuit's decision bars the EEOC from pursuing individual monetary relief on behalf of an individual who has signed an arbitration

agreement, the decision does nothing to hinder either the filing of a charge or the EEOC's enforcement actions through litigation. In fact, the EEOC could hardly possess a more potent weapon against employment discrimination than a federal court's issuance of an injunction barring the unlawful conduct and the continued reporting and oversight that goes along with such an injunction. The Fourth Circuit's decision does nothing to limit the effectiveness of the EEOC's enforcement authority in vindicating the public's interests.

b. The Fourth Circuit's decision strikes an appropriate balance between the competing interests of the federal policy favoring arbitration and the EEOC's enforcement rights.

The federal policy favoring arbitration has been repeatedly emphasized by this Court. As explained in Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1 (1983), under the FAA,

> *questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.* . . . The Arbitration Act establishes that, as a matter of federal law, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language*

itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25 (emphasis added). This Court has also instructed lower courts to generously construe the parties' intentions in favor of arbitrability. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

To completely disregard in an EEOC enforcement action the existence of a charging party's private agreement to arbitrate his employment related claims, as the EEOC suggests, utterly disregards the federal policy favoring arbitration. Indeed, such a result would enable an individual, who was party to an agreement to arbitrate with his employer, to intervene in a lawsuit brought by the EEOC seeking remedies for discrimination on behalf of the individual, whereas he could not have brought such a lawsuit in his own right.[4] Clearly, such a result would completely circumvent the individual's agreement to arbitrate and subvert the federal policy favoring arbitration.

Contrary to the EEOC's position, the Fourth Circuit's decision properly balances the competing goals of the EEOC's enforcement powers exercised in the public interest, discussed in General Telephone, supra, against the

[4]The enforcement provisions in Title VII allow that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . .." 42 U.S.C. § 2000e-5(f)(1).

strong national pro-arbitration policy expressed in the FAA. The EEOC's mandate to enforce the federal civil rights laws in the public interest is preserved by allowing the EEOC to continue to litigate a case for broad injunctive relief, despite the presence of an enforceable arbitration agreement signed by the employee on whose behalf the EEOC sues. At the same time, the federal policy requiring strict enforcement of arbitration agreements is preserved because the employee must pursue his individual monetary claims in arbitration pursuant to the terms of the arbitration agreement.

5. The Fourth Circuit's Decision Is Consistent With Decisions Of Other Courts Of Appeals In Which The Scope Of An EEOC Lawsuit Has Been Limited By Private Individuals.

Many cases have recognized that the scope of an action brought by the EEOC may be limited by actions taken by the individuals on whose behalf the EEOC sues. For example, in EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993), the Seventh Circuit held that the employee's individual ADEA lawsuit barred recovery by the EEOC of backpay, liquidated damages, and reinstatement on his behalf. Id. at 1291. A similar result was reached in EEOC v. United States Steel Corp., 921 F.2d 489 (3d Cir. 1990), in which the Third Circuit rejected the EEOC's overbroad interpretation of General Telephone and held:

> The absence of any formal designation of the individual claimants as parties, however, does not change the nature of the EEOC's role as the individuals' representative and should not change the effect of the doctrine of claim preclusion. By claiming or accepting individual relief won by the EEOC, the individuals would necessarily concede that the EEOC was their representative and that they were embraced by the EEOC's judgment. *For those individuals who have previously brought their own suits against USX and lost on the merits, this concession would be fatal. Having had their day in court, these individuals could not relitigate the same claim through a representative any more than they could relitigate the same claim on their own behalf.* . . . While it is true that the Commission has the responsibility to protect a vital public interest that transcends the interest of any and all aggrieved individuals, we have concluded, for the reasons previously explained, that the Commission's responsibilities include the representation of these grievants

> when it seeks individual relief on their behalf. *Thus, when the Commission seeks individualized benefits under the ADEA for particular grievants, as it did in this case, the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies.*
>
> ...
>
> Private litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are not vested with the authority to represent the EEOC. *But when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied.*

Id. at 496-498 (emphasis added).

There are also other circumstances in which the EEOC's ability to pursue individual monetary relief is limited by actions taken by the individual employee on whose behalf the EEOC sues. For instance in EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987),

the Ninth Circuit concluded that the individual employee's settlement of her personal claims "rendered her personal claims moot." Id. at 1542. Accordingly, the only relief still available to the EEOC was "injunctive relief to protect employees as a class and to deter the employer from discrimination." Id. at 1543. See also New Orleans Steam Ship Assoc. v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982) (EEOC may challenge a transaction that was the subject of a prior private action only if the EEOC seeks different relief); EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975) (settling employee not entitled to recover any additional private benefit such as back pay through EEOC action).

As demonstrated by this long line of cases, the Fourth Circuit's decision should not be disturbed. Its holding that Baker's arbitration agreement with Waffle House "can circumscribe the contours of the EEOC's suit in its own name to the extent it acts on behalf of the charging party" is amply supported by precedent derived from Congressional intent, decisions of this Court, and numerous courts of appeals.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Stephen F. Fisher
Jackson, Lewis,
Schnitzler & Krupman
2100 Landmark Building
301 North Main Street
Greenville, SC 29601-2122
(864) 232-7000

Attorneys for Respondent

Dated: July 17, 2000